AGENDA

Utah Supreme Court Advisory Committee / Rules of Evidence

November 10, 2020 / 5:15 p.m. – 7:15 p.m.

Meeting held via WEBEX

Approval of Minutes • *October 13, 2020*	Action	Tab 1	John Lund
URE 404(b). Character Evidence; Crimes or Other Acts. • Majority Statement • Minority Statement	Action	Tab 2	Judge Welch John Nielsen Dallas Young Teneille Brown
Doctrine of Chances	Action	Tab 3	Judge Welch
URE 106. Remainder of or related writings or recorded statements	Action	Tab 4	Judge Welch
URE 512. Victim Communications	Discussion	Tab 5	Judge Bates John Lund

Queue:
- URE 504. Lawyer-Client Privilege (LPPs, Regulatory Sandbox)
- Ongoing Project: Law Student Rule Comment Review

2021 Meeting Dates:
January 12, 2021
February 9, 2021
April 13, 2021
June 8, 2021
September 14, 2021
October 12, 2021
November 9, 2021

Rule Status:
URE 512 – Subcommittee. Waiting for Rep. Snow feedback.
URE 106 – Subcommittee
URE 404(b) – Subcommittee
URE 1101 – Approved by Committee. Ready to go to SC

Tab 1

UTAH SUPREME COURT ADVISORY COMMITTEE
ON THE RULES OF EVIDENCE

MEETING MINUTES
DRAFT
Tuesday – October 13, 2020
5:15 p.m.-7:15 p.m.
WebEx

Mr. John Lund, Presiding

MEMBERS PRESENT	MEMBERS EXCUSED	GUESTS	STAFF
Adam Alba	Lacey Singleton	Chris Williams, Leg. Research	Keisa Williams
Melinda Bowen		Prof. Paul Cassell	Nancy Merrill
Teneille Brown		Dr. Kelly Socia	
Deb Bulkeley		Heidi Nestel	
Tony Graf			
Mathew Hansen			
Ed Havas			
Chris Hogle			
Hon. Linda Jones			
John Lund, Chair			
Hon. Richard McKelvie			
John Nielsen			
Jennifer Parrish			
Nicole Salazar-Hall			
Michalyn Steele			
Hon. Vernice Trease			
Hon. Teresa Welch			
Hon. David Williams			
Dallas Young			

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1. Welcome and Approval of Minutes:

Mr. Lund welcomed everyone to the meeting and introduced Melinda Bowen, the newest member of the Evidence Advisory Committee.

***Motion:* John Nielsen made a motion to approve the minutes from the Evidence Advisory Committee meeting held on June 9, 2020. Dallas Young seconded the motion and the motion carried unanimously.**

2. URE 404(d). Character Evidence; Crimes or Other Acts:

Professor Cassell summarized his testimony and materials included in the packet. Utah should amend its rules of evidence to follow the approach of all federal courts and many state courts, to make similar crimes evidence presumptively admissible in sexual assault cases. There are shockingly high levels of sexual violence in the country and in Utah, particularly violence against women, and at the same time shockingly low levels of prosecution of that violence, especially in Utah. He reported the following data to the Committee for consideration:

- Nationally 18% to 25% of all women will be sexually assaulted or raped during their adult lifetime.
- In Utah, according to the Commission on Criminal and Juvenile Justice (CCJJ), 29% of women will be sexually assaulted or raped during their adult lifetime. CCJJ reports that rape is the only crime in Utah that has a higher than national average (approximately 20% higher according to the FBI).
- The United States Supreme Court said that, short of homicide, rape is the ultimate violation of self.
- Female rape victims have a lifetime prevalence of post-traumatic stress syndrome, somewhere between 32% and 80%, so the prevalence of harm of sexual assault and rape is very well established.
- According to national figures, 80% of all rapes and sexual assaults go unreported.
- According to CCJJ, in Utah, 88% of all rapes and sexual assaults go unreported. The prosecution rate is also low in Utah. Of the cases brought forward to policing agencies and prosecutors, the filing rate is 44%.
- The overall prosecution rate in Utah for rape and sexual assault is right around 5%.

Against the backdrop of low prosecution rates, it's important to provide juries with complete information about any other crimes of a sexual nature that the defendant may have committed. Sexual assault crimes are most often committed in private places, which means there is a general unavailability of witnesses, leaving the case dependent on contradictory testimonies. That makes it almost impossible for a prosecutor to meet a burden of proof beyond a reasonable doubt. This is a particular problem in acquaintance rapes. Frequently, defendants will claim consent, at which point any DNA or other physical evidence becomes essentially irrelevant. That immediately distinguishes sexual assault cases from other crimes in which consent is rarely offered as a defense. Providing evidence to the jury is critical to assess competing claims.

In 404(c), juries are allowed to hear evidence about defendants' other similar acts for children 13 years old and younger. The same principle that supports 404(c), supports adopting 404(d), extending the rule to victims 14 years and older.

Recidivism is the wrong subject of inquiry for the committee. Recidivism is conventionally defined in terms of an offender being convicted of crime, maybe serving time, and then being released, who maybe goes on to commit a repeat offense. But if you look at rules 404(c) and

proposed 404(d), they don't rest on a proposition involving recidivism, they rest on the well-supported, empirical proposition of serial perpetration. Sexual assaults are committed by serial perpetrators.

Professor Cassell referred to a March 2020 study by John Colbert looking at sexual assault prosecution, particularly on-campus sexual assaults involving alcohol. The study found that 87% of those sexual assaults were committed by serial perpetrators, suggesting that serial perpetrators should be the primary focus for these kinds of rules. Professor Cassell referenced recent, high profile cases such as the Bill Cosby and Harvey Weinstein cases. When considering whether a jury should hear from one victim or multiple victims, it's not a question of recidivism, it's a question of serial perpetration. Adopting 404(d) wouldn't be introducing a novel concept into the law. Propensity evidence in these cases was upheld by the Utah Supreme Court in 1900, just four years after we became a state.

In *State v. Hilberg*, the court held that prior bad acts of a sexual nature made it more probable that the charged crime had been committed by the defendant. In *State v. Williams*, the Supreme Court clearly describes the prevailing law in the country, to allow sexual misconduct evidence. Today, the majority of states admit propensity evidence in sexual assault cases and in 1994, the federal rules were amended to incorporate FRE 413 and FRE 414.

If 404(d) were adopted, the language would look very similar to 404(c), extending it to include sexual assaults of victims who are fourteen years of age and older. Some argue that this is a policy decision, but the Utah Supreme Court resolved that policy question for those 13 years and under. The same considerations of policy apply here and I think you have an even stronger mandate to do so. We have 12 years of experience with 404(c) and I haven't heard any complaints about how that rule is operating. I think it's fair to say that it's brought clarity to the law. Because 404(b) does not specifically address the problems he previously discussed, it would lead to conflicting interpretations.

Judge Welch: Wouldn't the argument for 404(d) be the same for domestic violence cases, making 404(e) the next logical step or do you think domestic violence cases are categorically different than sexual violence cases?

Professor Cassell: Enacting a 404(d) is codifying a prevailing law that has existed in the country for more than a century. A case could be made that, historically, domestic violence cases have been under-prosecuted and a 404(e) could be investigated, but for now 404(d) is the next logical step.

Professor Brown: What are the benefits of creating a rule 404(d) through the Evidence Advisory Committee and the Supreme Court as opposed to going through the legislature and getting someone from the legislature to sponsor something similar?

Professor Cassell: Addressing the 404(d) issues through the legislature is an option that Professor Cassell and Heidi Nestel discussed before presenting to the Evidence Advisory Committee. They have identified appropriate partners if the Evidence Advisory Committee defers. Ms. Nestel noted no strong opinion on which route is better. They are presenting today with the hope that the Evidence Advisory Committee will recommend adopting 404(d) to the Supreme Court.

Ms. Nestel: Professionally, she was a prosecutor for ten years and for the last fifteen years she has been the Director and staff attorney for the Utah Crime Victims Legal Clinic; a non-profit organization that serves victims statewide. Ms. Nestel has extensive experience in representing sexual assault victims in the majority of counties statewide. She has a deep appreciation and understanding for the importance of these types of cases and the evidentiary issues for all of the parties involved.

The adoption of 404(d) will result in a higher sexual assault reporting rate. The more serious sexual assault perpetrators will be held accountable, and most importantly, the serial sexual assault perpetrators will get help through rehabilitation and supervision. I foresee 404(d) only being invoked in cases where there is evidence of repeated sexual perpetration. The consequence for repeat sexual perpetration is that their previous behavior will be known to the jury. The testimony anticipated to come in under 404(d) would be subject to rigorous cross-examination. Federal Rule 413 and 404(c) process of having a pretrial hearing on whether the evidence is credible by a preponderance of the evidence. That process would inherently provide safeguards that protect defendants. Ms. Nestel highlighted the following points:

- The nature of sexual crimes is unique and severe. The impact of sexual assault is a lifelong sentence.
- Negative consequences include mental health issues, extreme stress, and life disruption that never goes away. Once it takes root in the victim's brain, their life is changed forever.
- Sexual assault crimes are under-reported and kept in the dark. Without a lot of physical evidence and independent witnesses, it comes down to the victim's word against the defendant's. That is often not enough take a case to trial.
- Countless sexual assault cases are declined or dismissed because the victim's word is challenged by the defendant's account, which usually comes down to consent.
- Proposed 404(d) is so critical because it gives support and credibility to the victim's experience.
- Serial sex offenders pose unique dangers to our society.
- The adoption of 404(d) is consistent with the effort to balance the scales of justice and ensure a fair process based on current research and what we know about sexual assault.

The Committee discussed specific cases that excluded or allowed prior sex offense testimony, and whether 404(b) covers the issues.

Dr. Kelly Socia: Associate Professor at the University of Massachusetts School of Criminology and Justice Studies, presented on sex offender recidivism rates and FRE 413. Dr. Socia does not believe that Utah should adopt 404(d). He discussed the following topics:

- **Estimating Sexual Recidivism**. Estimating recidivism rates for sex offenders depends on what is being measured. What is the type of recidivism event? Is it an arrest, charge, or conviction? Other considerations include the type of crime. Are you just looking at sex crimes, or is it any crime crimes? Do violations count? What is the population sample? Are you looking at everyone on the registry, or just a certain subset (child molesters, rapists, child pornographers, voyeurs, etc.). What is the follow-up period? Are they using 3, 5, or 25 year estimates? Charges yield a higher percentage, but there are also more false positives. Convictions yield a lower percentage, but you'll miss people and get more false negatives. Re-arrests are the most common measure of recidivism. The more specific the population sample, the more precise the estimates are, but they are also less generalizable. Dr. Socia discussed several studies using official records to estimate recidivism rates. You can cherry-pick a study that tells you what you want. The data concludes that the longer the person convicted of a sex offense goes without re-arrest, the less chance of recidivism for a new sex crime.
- **Public Perceptions of Recidivism.** Studies show that the general public and justice and judicial officials view sex offenders as a homogeneous group, consisting of untreatable sexual predators and pedophiles with stranger victims that are extremely high risk for recidivism. They do not believe that the recidivism rate is only 7.7% after 9 years. Most would guess 70, 80, or 90%. Dr. Socia pointed to studies highlighting the public's perception of sex offenders and noted that the public will make up the juries. A frequently misused quote about sex offender statistics in court cases comes from Justice Anthony Kennedy. He wrote that the recidivism rate for untreated sex offenders has been estimated to be as high as 80%. In a follow-up case, Kennedy wrote that the risk of recidivism posed by sex offenders is "frightening and high." That "frightening and high" 80% statistic was taken from a Department of Justice user manual (not a peer-reviewed study), which in turn took that statistic from an article in Psychology Today. That article quoted Dr. Freeman Longo. His actual quote was, "estimates of the recidivism rate among untreated sex offenders ranges between 35% to 80%" and he was specifically referring to a group of offenders that he worked with at a very high-risk facility. When asked about that quote in a recent interview, he said, "that [80% statistic] got taken to say that all sex offenders recidivate at 80%. That is absolutely incorrect. It's wrong. It's untrue." Dr. Socia has conducted research that shows using the term "sex offender" increases the public's fear. The public is using the label "sex offender" as an either-or category, leading to another quote, "once a sex offender always a sex offender". Dr. Socia noted research showing that past criminal history also influences the likelihood that police will arrest again compared to a person with no past criminal history. When questioning whether a defendant's prior conviction makes them a high risk to re-offend, other factors need to be considered. Some of the factors include, the number of prior sexual offense convictions, employment or stable housing, and the number of years since

release. He concluded that presenting any evidence of any prior sex offense will likely result in the jury viewing the defendant as a part of the "sex offender" category, and thus will make them more likely to see the defendant as guilty of the current crime, regardless of the evidence.

- **Recommendations Regarding FRE 413.** Because of labeling, public perception, and stigmatism, adopting and incorporating FRE 413 into Utah's rules will create a lot of problems. Adoption could result in undue stigma assigned to the defendant without the safeguards offered by the traditional rules of evidence. The public, including jurors and judges, do not easily distinguish different risk levels among sex offenders. Dr. Socia shared a list of sources and noted that to protect the individual's right to defend themselves in court, the only prior acts admitted should be those proven in the court of law.

Mr. Lund to Professor Cassell**:** If recidivism rates are not used to predict a tendency for committing the act again, then what data is should be used?

Professor Cassell: It is useful to look at propensity evidence given the high rate of serial perpetration.

Mr. Lund: Is there data available in other jurisdictions, or possibly in the federal system, showing that when evidence of prior crimes has been admitted, the recidivism rate is lower?

Professor Cassell: No, because you cannot control all the other factors involved. The one data point that we can use is a set of opinions showing that 404(c) has worked well in Utah for the last twelve years.

Deborah Bulkeley: Is there any evidence that shows in states that have adopted this rule or even federally that victims are more likely to report if this rule is adopted?

Heid Nestel: There are a number of resources that I can forward to the Committee backing up the suggestion that if 404(d) were adopted, it would reduce the victim's hesitation to report because the jury will be more likely to believe their testimony.

Judge Welch: Is it cleaner to look at propensity evidence through the lens of 404(b) to get to the same desired outcome of proposed 404(d)?

Professor Cassell: Going through 404(b) would add confusion for the jury about what evidence they can use. He provided several examples. What is the rational for saying, if the victim is over fourteen years of age, propensity evidence is not allowed?

Mr. Graf: If these are under-reported crimes, wouldn't recidivism be affected as well?

Dr. Socia: The public believes that the recidivism rate is 70%-90%, even allowing for the under-reporting of sexual crimes. I don't believe the real statistics would be anywhere close to that. The problem is identifying how high the recidivism rate really is for sex offenders, and that rate isn't measured.

Professor Cassell: I agree that the exact recidivism rate isn't measured, but the Committee should look at the data showing that sexual assaults are a problem, as is serial perpetration.

Nicole Salazar-Hall: Can all of this evidence be presented at sentencing? Dallas Young: Yes.

Professor Cassell: There may never be a sentencing if the case gets dismissed. The problem lies in under-reporting and under-prosecuting.

Mr. Lund: Is there evidence that adopting 404(d) has one way or another changed the experience for victims? Is there any conviction rate data in jurisdictions where propensity evidence is permitted?

Professor Cassell: I have not seen quantitative data, but there are qualitative examples. Utah has one of the lowest prosecution rates, which leads to low conviction rates. The problem with using conviction rate figures is that the data is not considered to be reliable because it depends on whether prosecutors push for convictions in challenging cases.

The Committee discussed the two perspectives presented at the meeting.

Dallas Young: I do not think 404(d) is necessary. There are procedures in place that allow for propensity evidence.

John Nielsen: Adopting 404(d) is good policy to increase disclosure and encourage victims to report.

Professor Brown presented social science information to the Committee. Based on human behavior research, people will make character references and judgments whether they have past act information or not. It isn't possible to provide propensity evidence for a limited purpose. Jurors will react to propensity evidence whether 404(d) is incorporated or not. That's human nature.

The Committee voted on whether 404(d) should be adopted.

- 6 members voted yes, recommend adopting Rule 404(d)
- 9 members voted no, do not adopt Rule 404(d)
- 1 member was undeclared

The Committee discussed the rational for not adopting 404(d) when the standard was adopted in 404(c) for younger people, whether 404(a) and 404(b) are all that's needed to address propensity evidence, and whether adopting 404(d) would result in the exceptions swallowing the rule.

The Committee voted to recommend that the Supreme Court not adopt rule 404(d) and to draft a memo outlining the reasons discussed. The Supreme Court should also know that the decision wasn't unanimous, and they should be provided with the opposite view.

- John Nielsen and Professor Brown will write the minority
- Dallas Young and Judge Welch will write the majority

The Committee will review the draft memos at the November 10th meeting.

2. **URE 106. Remainder of or related writings or recorded statements**
   Will be addressed at the November meeting.

3. **URE 512. Victim Communications**
   Will be addressed at the November meeting.

4. **Other Business:** None

The meeting adjourned without a motion.

Next Meeting:
November 10, 2020
5:15 p.m.
Via WebEx

Tab 2

UTAH SUPREME COURT ADVISORY COMMITTEE

RULES OF EVIDENCE
JOHN R. LUND
CHAIR

November 6, 2020

URE 404(d): Majority statement - Recommendation not to adopt

Introduction

On January 2, 2020, the Utah Supreme Court directed the Advisory Committee on the Utah Rules of Evidence (Committee) to consider the possible adoption of Rule 413 of the Federal Rules of Evidence (FRE 413). The Committee formed a Subcommittee to research all pertinent materials, and the Subcommittee reported their work and findings to the Committee. Over the course of many months, the Committee discussed relevant Federal and Utah laws, law review articles, a 50-state survey, and a draft Utah rule (URE 404(d)) that would incorporate a FRE 413 provision into the Utah Rules of Evidence. The Committee also invited speakers from various agencies to present their views on whether Utah should adopt a FRE 413 provision.[1] On October 13, 2020, the Committee discussed and debated whether the Utah Rules of Evidence should include a FRE 413 provision. The Committee then voted on this issue. The result of this vote indicates that a majority of the Committee members believe that the Utah Rules of Evidence should <u>*not*</u> adopt a FRE 413 provision. This Memorandum outlines the reasons for the Committee's vote.

FRE 413, FRE 414, and URE 404(c)

Both the Federal and Utah rules of evidence exclude the introduction of prior act evidence for propensity purposes. *See* Fed. R. Evid. 404(b)(1) & Utah R. Evid. 404(b)(1) (Both rules indicating that "[e]vidence of a person's character or character trait is not

[1] The invited speakers presented their views to the Committee on October 13, 2020. These speakers included: (1) Professor Paul Cassell (University of Utah Law Professor), (2) Dr. Kelly Socia (Associate Professor of Criminology and Justice Studies at UMass Lowell), and (3) Heidi Nestel (Executive Director & Staff Attorney at the Utah Crime Victims Legal Clinic).

admissible to prove that on a particular occasion the person acted in conformity with the character or trait."). The Federal and Utah rules, however, provide exceptions to the rule that prohibits or bans a party from introducing prior act evidence for propensity purposes. Specifically, rule 414 of the Federal Rules of Evidence permits the introduction of prior act evidence of child molestation for propensity purposes. *See* Fed. R. Evid. 414. Similarly, rule 404(c) of the Utah Rules of Evidence permits the introduction of prior act evidence of child molestation for propensity purposes. See Utah R. Evid. 404(c) (stating that "[i]n a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other acts of child molestation *to prove a propensity* to commit the crime charged.") (emphasis added); *see also State v. Murphy*, 2019 UT App 64, ¶50, 441 P.3d 787 (J. Harris concurring) (stating that "[i]n 2008, Utah enacted a version of rule 414 of the Federal Rules of Evidence, and now categorically allows propensity evidence in child molestation cases, regardless of whether that evidence meets the requirements of rule 404(b)(2).").

In addition, rule 413 of the Federal Rules of Evidence permits the introduction of prior act evidence involving sexual assaults for propensity purposes. *See* Fed. R. Evid. 413 (stating that "[i]n a criminal case in which a defendant is accused of a sexual assault, the court may admit evidence that the defendant committed any other sexual assault."). Importantly, the Utah Rules of Evidence *do not* currently contain an equivalent FRE 413 provision that would permit the introduction of sexual assault evidence for propensity purposes. *See Murphy*, 2019 UT App 64, ¶50 (J. Harris concurring) (stating that "Utah has not enacted any version of rule 413 of the Federal Rules of Evidence, nor has it ever adopted any version of the "lustful disposition" exception, meaning that in cases where the defendant stands accused of sexually assaulting anyone who is fourteen years of age or older, there is no categorical rule allowing admission of that defendant's prior acts of sexual assault. Prosecutors attempting to introduce such evidence in adult sexual assault cases must demonstrate that the evidence they proffer meets the requirements of rule 404(b)(2).").

A draft URE 404(d) (FRE 413 Provision)

Temporarily putting aside the issue of *whether* Utah should adopt a FRE 413 provision, the Committee discussed the issues of *where* and *how* a FRE 413 provision could be incorporated into the Utah rules. The Committee decided that any FRE 413 provision would best be incorporated into the Utah rules as Utah Rule of Evidence 404(d) (URE 404(d)). A URE 404(d) was drafted, and this draft rule incorporates pertinent language from Utah Rule of Evidence rule 404(c). Specifically, the URE 404(d) draft rule changes the "child molestation" language contained in Utah rule of evidence 404(c) to read "sexual assault" in URE 404(d). *See* Utah R. Evid. 404(c). The draft URE 404(d) that was discussed by the Committee is as follows:

(d) Evidence of Similar Crimes in Sexual Assault Cases.

(d)(1) Permitted Uses. In a criminal case in which a defendant is accused of sexual assault, the court may admit evidence that the defendant committed any other acts of sexual assault to prove a propensity to commit the crime charged.

(d)(2) Disclosure. If the prosecution intends to offer this evidence it shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

(d)(3) For purposes of this rule "sexual assault" means an act committed under state law as defined in [Utah Code Section 76-5-405; insert other pertinent code sections].

(d)(4) Rule 404(d) does not limit the admissibility of evidence otherwise admissible under Rule 404(a), 404(b), or any other rule of evidence.

Utah R. of Evid. 404(d) (draft rule). The language of this draft rule would incorporate a FRE 413 provision into the Utah Rules of Evidence.

Arguments for the Adoption of URE 404(d) (a FRE 413 Provision)

The Committee reviewed various arguments that were given to support why the Utah Rules of Evidence should adopt URE 404(d) (a FRE 413 provision). Importantly, many of the reasons that were offered to support why Utah should adopt URE 404(d) are similar to the reasons that were previously given for why FRE 413 was adopted. *See* Michael S. Ellis, Comment, 38 *The Politics Behind Federal Rules of Evidence 413, 414, and 415*, Santa Clara Law Review 961, 980-82 (1998) (discussing Congress's reasons for why FRE 413 was adopted). The reasons offered to support the adoption of URE 404(d) (a FRE 413 provision) are as follows:

1. Sexual assault crimes are serious and often underreported. Utah crime statistics indicate that high rates of serious sexual violent crimes are occurring; moreover, these crimes are often not reported. Thus, Utah should adopt a FRE 413 provision to reduce the frequency of these serious crimes. *See* Santa Clara Law Review, at 980.

2. There is a low prosecution rate for sexual assault crimes. Crimes of sexual assault are difficult to prosecute because these crimes "generally take place in private, and thus, there are few witnesses and little direct evidence available to be used at trial." Santa Clara Law Review, at 980. If Utah adopts a FRE 413 provision, it will make sexual assault crimes easier to prosecute.

3. People who commit sexual assaults are recidivists and will likely repeat their crimes. The recidivist nature of those who commit sexual assault is probative,

thus "procedural exceptions should be made in the prosecution to demonstrate [a sex offender's] repetitive, criminal nature." Santa Clara Law Review, at 981. In other words, because there is a prevalence of sex-offenders who are "serial perpetrators,"[2] Utah should adopt a FRE 413 provision.

4. Because Utah adopted Rule 404(c), it logically follows that Utah should also adopt Rule 404(d). In 2008, Utah adopted rule 404(c), a FRE 414 provision, that permits the introduction of prior act evidence of child molestation for propensity purposes. *See* Utah R. Evid. 404(c). It logically follows that Utah should now also adopt rule 404(d), a FRE 413 provision, to permit the introduction of prior act evidence of sexual assault for propensity purposes. In short, the same reasons that justified permitting the introduction of prior act evidence of child molestation for propensity purposes now also justifies permitting the introduction of prior act evidence of sexual assault for propensity purposes.

Arguments Against the Adoption of URE 404(d) (a FRE 413 Provision)

The Committee also reviewed various arguments that were given to support why the Utah Rules of Evidence should *not* adopt URE 404(d) (a FRE 413 provision). The reasons offered for why Utah should *not* adopt a FRE 41 provision are as follows:

1. The recidivism rates for sexual assaults/sex offenders do not support the adoption of URE 404(d) (a FRE 413 provision). While "there are statistics which show that people who commit sexual assaults are recidivist… there are other statistics which say that such people are no more likely to repeat their crimes than other people who commit serious crimes, such as murderers or drug distributors." Santa Clara Law Review, at 981. Importantly, current empirical data and research studies indicate that the general public is mistaken in believing that there is a high rate of recidivism for sex offenders.[3]

2. The lack of a limiting principle/The exceptions will swallow the rule banning propensity evidence: Proponents of URE 404(d) have not provided a limiting principle (i.e., a principle that would effectively limit the types of crimes that could be admitted under Utah rule 404 for propensity purposes). In other words, proponents of URE 404(d) argue that Utah should adopt rule 404(d) (admitting

[2] On October 13, 2020, Professor Cassell spoke to the Committee about the prevalence of sex offenders who are "Serial Perpetrators" in Utah as being a reason for why Utah should adopt a FRE 413 provision.
[3] On October 13, 2020, Dr. Kelly Socia gave a presentation to the Committee wherein he discussed various public misconceptions about sex offender recidivism rates. In his presentation, Dr. Kelly pointed to studies that indicate that "[a] rough estimate of the sexual recidivism rate[s] for individuals with prior sex crime convictions is that between 5 and 15% will be rearrested for a new sex crime within 5 years of release." *See* Dr. Socia's supplementary materials, Power Point Slide #5. Dr. Socia highlighted that the "high and frightening [sexual offender] recidivism statistic of 80%, cited on multiple cases, and believed by the public, is based on absolutely no evidence!" *See id.*, at Power Point Slide #8.

sexual assault prior acts for propensity purposes) for the very same reasons that it adopted rule 404(c) (admitting child molestation prior acts for propensity purposes). But under this logic, it would necessarily follow that Utah should then also adopt a rule 404(e) (admitting domestic violence prior acts for propensity purposes) because domestic violence crimes are (1) serious, (2) underreported, (3) difficult to prosecute, and (4) repeated by offenders. In short, the logic and reasons used to support the adoption of URE 404(d) would also support the adoption of a URE 404(e) (domestic violence), the adoption of a URE 404(f) (murder), the adoption of a URE404(g) (kidnapping), and so on. *See* Santa Clara Law Review, at 981 (discussing how there are many types of serious crimes that are difficult to prosecute because they occur in private areas and have no witnesses).

Importantly, if there is no limiting principle to prevent Utah rule 404 from adopting multiple exceptions/provisions that would admit prior acts for propensity purposes for multiple types of crimes, the exceptions would effectively swallow the propensity ban rule. That is, the important rule or principle embedded in Utah Rule of Evidence 404 is a propensity ban: "[i]t is 'fundamental in our law that a person can be convicted only for acts committed, and not because of general character or a proclivity to commit bad acts.'" *State v. Lane*, 2019 UT App 86, ¶ 17, 444 P.3d 553 (internal citation omitted); *see also* Utah R. Evid. 404(b)(1). "Propensity evidence has great probative value, which is in part why *our rules of evidence ban it*." *Lane*, 2019 UT App 86, n.10 (emphasis added). Rule 404 of the Utah Rules of Evidence bans propensity evidence because it is fundamental to our legal system that a person will only be convicted for what he has done, not for who he is. If Utah rule 404 was amended to carve out multiple exceptions that permitted multiple types of crimes to be introduced for propensity purposes, the rule banning the admission of propensity evidence would lose its importance and meaning.

3. <u>Increased rates of sexual assault crimes in Utah is not a sufficient reason to adopt URE 404(d).</u> Under the rationale that increased rates of sexual assaults in Utah warrant the adoption of URE 404(d), character evidence/propensity evidence exceptions would also have to be made for any other types of crime that show increased crime rates (e.g., drug possession crimes, DUI crimes, murder crimes, etc.). *See* Santa Clara Law Review, at 981. For reasons already addressed, expanding the rule 404 exceptions to increase the types of crimes that could be introduced for propensity purposes would be problematic because it would undercut the current Utah rule that bans the introduction of propensity evidence.

4. <u>The plain language of rule 404 is already adequate</u>: The plain language of Utah Rule of Evidence 404 is sufficient to address the important policy concerns that have been addressed by proponents of URE 404(d). Specifically, rule 404(b)(1)

indicates that prior act evidence is prohibited for propensity uses. *See* Utah R. Evid. 404(a)(1). Nevertheless, under rule 404(b)(2), prior act evidence may be admitted for a number of non-propensity uses. *See* Utah R. Evid. 404(b)(2). The proponents of URE 404(d) have not provided sufficient arguments for why the plain language of rule 404(b)(1) & (2) cannot already adequately address the policy concerns that have been raised to support the adoption of rule 404(d).

Conclusion

On October 13, 2020, the Committee met (remotely) and discussed the various arguments as summarized in this Memorandum for why the Utah Rules of Evidence should, or should not, adopt URE 404(d) (a FRE 413 Provision). The Committee then voted, and the majority of the members of the Committee decided that Utah should *not* adopt URE 404(d) (a FRE 413 Provision). In short, the Committee members were more persuaded by the arguments and reasons that were provided for why the adoption of URE 404(d) should *not* occur. In short, the majority of the members of the Advisory Committee on the Utah Rules of Evidence believe, for reasons outlined in this Memorandum, that the Utah Rules Evidence should *not* adopt a FRE 413 provision.

UTAH SUPREME COURT ADVISORY COMMITTEE

RULES OF EVIDENCE
JOHN R. LUND
CHAIR

November 6, 2020

URE 404(d): Minority statement - Recommendation to adopt

Your Honors,

You recently asked our committee for a recommendation for or against adopting proposed rule 404(d), which would mirror federal evidence rule 413. The majority of the committee recommends against adoption, but a significant number disagree with that recommendation. The minority submits this statement urging this Court to adopt proposed rule 404(d).

We believe that this Court should adopt proposed rule 404(d) to protect victims, address lower court concerns in this area, and to encourage intellectual honesty in applying the rules. And unlike the majority, we do not believe it will lead the Court down a slippery slope of exceptions.

Protecting Victims from Under-Prosecution of Sexual Assault

Proposed rule 404(d) would protect vulnerable victims by encouraging more reporting and prosecution of sex crimes. By nature, these crimes are both uniquely heinous and uniquely difficult to prosecute because proving non-consent often hinges on assessing credibility. *Coker v. Georgia*, 433 U.S. 584, 597 (1977) ("Short of homicide, [rape] is the ultimate violation of self.") (cleaned up); *LeBeau v. State*, 2014 UT 39, ¶50, 337 P.3d 254 ("And sexual crimes, particularly those involving children, represent an especially heinous form of bodily insult."); *In re J.F.S.*, 803 P.2d 1254, 1259-60 (Utah Ct. App. 1990) (explaining that rape cases are a type of crime "for which corroboration may be uniquely

absent," because in "most [rape] cases, there are no witnesses," no recordings, "no contraband," often no physical evidence to prove nonconsent) (quoting Susan Estrich, *Rape*, 95 Yale. L. J. 1087, 1175 (1986)). Simply put, if the prosecution cannot corroborate a victim's testimony with the defendant's prior sexual assaults, sexual-assault prosecutions will remain unacceptably low. This problem is particularly pronounced in Utah, reflected in an estimated prosecution rate of merely 5.2%. Professor Paul Cassell Testimony, Evidence Rules Committee, October 13, 2020, at 5.

Recognizing these difficulties, this Court has already taken steps to encourage greater reporting and prosecution of sex crimes by enacting rules 412 and 404(c). The history of rule 412 is instructive here. This Court has long protected victim privacy by disfavoring evidence of victims' sexual conduct with persons other than their rapists. Before 1994, courts analyzed these claims exclusively under general relevancy and character rules. Utah R. Evid. 412 [Reserved.] (Mitchie 1994), Advisory Committee Note (declining to adopt federal Rule 412 and opining that the subject "is better covered by Rules 404 and 405") (citing State v. Howard, 544 P.2d 466 (Utah 1975)). *See, e.g., State v. Williams*, 773 P.2d 1368, 1370 (Utah 1989) (explaining that "[e]vidence of a victim's prior sexual encounters is generally not relevant" in rape prosecution, and that even if "marginally relevant, may be excluded under rule 403"); *State v. Johns*, 615 P.2d 1260, 1263 (Utah 1980) (explaining that "the fact that a woman has consented to sexual activity in the past under different circumstances and with individuals other than the defendant has little if any relevancy to the question of her consent in the situation involved here").

But in 1994, this Court adopted rule 412 because "the absence of a specific rule" had posed a "significant deterrent" to sexual assault victims "participating in prosecutions because of the fear of unwarranted inquiries into" their private sexual lives. Utah R. Evid. 412, Advisory Committee Note (Mitchie 1995) (adopted effective July 1, 1994). By "expressly disfavoring the admission of evidence of sexual behavior and predisposition in criminal proceedings," this new rule would "protect the fact finding process" against inflammatory evidence, "safeguard[]" victim privacy, and encourage victims "to institute and participate in criminal proceedings." *Id.*

The majority of the committee explained their position rejecting adoption in part by saying that rules 404(b) and 403 were adequate to protect victims because courts routinely admit other acts evidence against defendants in sex cases. True enough, that evidence can be admissible under existing rules, if offered for non-propensity purposes under 404(b), such as to prove intent or lack of consent. *See, e.g., State v. Nelson-Waggoner*, 2004 UT 29, 94 P.3d 186; *State v. Balfour*, 2018 UT App 79, 418 P.3d 79; *State v. Marchet*, 2014 UT App 147, 330 P.3d 138. But the same could be said of excluding victim sexual history before rule 412. It happened, but—according to this Court—not often enough.

So too here. While existing rules *permit* courts to admit prior sex assault allegations, more victims would come forward and prosecutions would be more likely if other acts

were presumptively admissible, and explicitly for propensity purposes. We say "presumptively" because the evidence in any given case will still be subject to rule 403. *Cf. State v. Cuttler*, 2015 UT 95, 367 P.3d 981 (applying rule 403 to propensity evidence for child molestation under rule 404(c)). Rule 403 will continue to provide an important backstop to other-acts evidence, as many—if not most—such disputes revolve around rule 403 rather than rule 404.

Relatedly, this Court adopted rule 404(c) in 2008 to admit prior evidence of child sex offenses to show propensity. We do not have personal knowledge of the history behind adopting 404(c). However, Professor Cassell testified that 404(c) was first adopted to cautiously observe its impacts before expanding the exception to adult victims. He further testified that the concerns raised at the time—that the 404(c) exception may be difficult to apply and may cause injustice—did not materialize. Professor Paul Cassell Testimony, Evidence Rules Committee, October 13, 2020.

History aside, 404(c)'s policy of protecting vulnerable victims and encouraging greater reporting and prosecution is clear. There is no principled basis for drawing a sharp distinction between adult and child victims of sexual assault. Indeed, as adult victims are overwhelmingly female, they may benefit even more from the proposed rule 404(d). Adult women are more likely than children to be blamed for their assault and to have their credibility questioned. Major Michael J. McDonald, *Rape Is Rape How Denial, Distortion, and Victim Blaming Are Fueling A Hidden Acquaintance Rape Crisis*, Army Law. at 35 (2014). Additionally, there is a common misconception that false allegations of rape are common, despite empirical data demonstrating otherwise. Tyler J. Buller, *Fighting Rape Culture with Noncorroboration Instructions*, 53 Tulsa L. Rev. 1, 7 (2017)

Addressing Lower Court Rulings in this Area and Concerns of a Slippery Slope

Enacting rule 404(d) will also resolve concerns that prompted this Court—at least in part—to ask the committee for its opinion in the first place. *See* Utah Supreme Court Directive to the Advisory Committee on the Utah Rules of Evidence, January 2, 2020, at 4-6; *State v. Argueta*, 2020 UT 41, ¶33, 469 P.3d 938 (referencing referral to this committee). Before referring the question to this committee, this Court heard concerns from Judge Pullan of the Fourth District (who presented at the judicial conference and to the committee) and Judge Harris of the Court of Appeals (who has written two concurring opinions). *Id.* Those concerns included whether admitting prior bad acts "based on human volition" was "just propensity reasoning dressed up in 'probability' clothing." Hon. Derek Pullan, Remarks to Evidence Advisory Committee, January 14, 2020, at 7; *State v. Lane*, 2019 UT App 86, ¶¶40-41, 444 P.3d 553 (Harris, J., concurring) (similar); *State v. Murphy*, 2019 UT App 64, 441 P.3d 787 (Harris, J., concurring) (similar). These judges feel that if courts are going to admit prior sex acts to prove consent, they would feel less cognitive dissonance if the evidence were admissible for propensity. Proposed rule 404(d) would address this concern by admitting other sex abuse allegations explicitly for

propensity. Additionally, many of these past sexual assaults are still being admitted for ostensibly non-propensity purposes, and being heard and considered by the jury.

The majority was also concerned about a slippery slope—that if this Court were to adopt rule 404(d), then up next would be rule 404(e) for domestic violence and rule 404(f) for another area, and so on until exceptions swallowed the rule. But as this committee's work shows, this Court considers proposed modifications one at a time and makes reasoned decisions based on the available evidence. Taking one step by no means requires taking another in the future. The fact that it took twelve years to even consider this small expansion from child to adult sexual assault victims suggests that this is not an inevitable slippery slope, but rather a sensible, small step toward including highly probative—and oftentimes critical—evidence.

Finally, the majority was concerned that there was very little quantitative data to support adopting rule 404(d). But as both Professor Cassell and Doctor Socia explained to us, there is a wide range of reported recidivism rates, depending on the methodology and population being studied. It may be that jurors over-estimate the likelihood that someone who has previously committed one sexual assault will likely do so again. However, there are many other areas where jurors overestimate the reliability of evidence—such as eyewitness identification—and the remedy is not to categorically deny it, but to allow it to be put into context through jury instructions or additional testimony. Additionally, the recidivism rates for serial rapists can be quite high. Denying the jury access to this information can lead to a miscarriage of justice. Once someone has multiple accusations against them, they are by definition in the recidivist group.[1] And we are unaware of this Court requiring empirical data before adopting rules 404(c) and 412.

Encouraging Intellectual Honesty and Ease of Application of the Rules

We would be remiss if we did not mention the headache caused by relying on 404(b) to admit sexual assault evidence. As Judge Harris recognized in State v. Murphy, "[t]he difficulty, of course, lies in attempting to determine when evidence is offered for a permissible non-propensity purpose and when a party is merely attempting to dress up propensity evidence as something else in order to gain its admission." *State v. Murphy*, 2019 UT App 64, ¶ 51, 441 P.3d 787, 802 (Utah 2020). Indeed, many evidence scholars recognize that traditional 404(b) uses such as to prove intent or a lack of fabrication, actually require propensity reasoning. Rather than asking judges to walk the razor-thin tightrope between permissible and impermissible propensity inferences, about "half of

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[1] Doctor Socia opined to us that prior instances be admissible only if they resulted in conviction. But we note that charging and conviction are not prerequisites, and even acquittal is no bar, to admitting other acts evidence. *See Dowling v. United States*, 493 U.S. 342, 348-49 (1990); *State v. Killpack*, 2008 UT 49, ¶46, 191 P.3d 17; *State v. Widdison*, 2001 UT 60, ¶43 n.9, 28 P.3d 1278; State v. Nelson-Waggoner, 2000 UT 59, ¶31, 6 P.3d 1120.

the fifty states have judicially recognized a common-law "lustful disposition" exception to the general ban on propensity evidence." *State v. Murphy*, 2019 UT App 64, ¶ 49, 441 P.3d 787, 801, *reh'g denied* (Jan. 27, 2020), *cert. denied*, 466 P.3d 1074 (Utah 2020).

Utah judges are not alone in finding it difficult to apply rule 404(b). It is the *most frequently litigated rule of evidence*, and in many jurisdictions the *most likely basis for reversal*. Edward Imwinkelried, *Uncharged Misconduct*, 1 Crim Just. 6, 7 (1986). Jurors likewise struggle to differentiate between propensity and non-propensity uses. Significant social science evidence demonstrates that we draw character inferences subconsciously, spontaneously, and immediately upon learning of someone's past acts. Teneille Brown, *Content of Our Characters*, (draft on file with author that summarizes this data). Understanding that evidence of past sexual assault is particularly probative, Utah commentators have recognized "courts generally find a theory of admissibility [for sexual assault cases], even if no specific theory of admissibility makes sense." *See* R. Collin Mangrum & Dee Benson, *Mangrum & Benson on Utah Evidence* 227 (2018–19 ed.). Rather than asking judges to put forward a non-propensity basis and risk a lengthy appeal, it would be better to explicitly permit this sort of evidence when it is satisfies rule 403.

Conclusion

We urge this Court to adopt proposed rule 404(d) for the following four reasons: it will 1) protect victims of sexual assault by increasing reporting and prosecution of these terrible crimes that uniquely rely on credibility assessments; 2) address at least some of the concerns that lower court judges have in this area; 3) permit a reasonable step based on the evidence and not create a slippery slope; and 4) will reduce unnecessary appeals by providing a rule that is easier to administer and defend.

Tab 3

Notes from Rule 404 Subcommittee's August 14, 2020 Meeting:

Committee Members: Judge Teresa Welch (Chair), Tenielle Brown, John Nielsen, Dallas Young. (Note: Dallas Young could not attend the 8/14 Meeting so he contributed via e-mail to the discussion of pertinent issues).

The Rule 404 Subcommittee met on August 14, 2020 (via Zoom) and discussed the following:

(1) On the issue of whether proposed Rule 404(d) should be promulgated (which is effectively a FRE 413 provision): The Committee would like to receive some empirical research/evidence/data on the recidivism rates for sex offenders/sexual assaults, as this would facilitate the discussion and debate regarding the policy considerations surrounding 404(b). Generally, any pertinent studies/evidence/data that is applicable to the policy considerations at issue with this rule would be helpful. (For example, an important question raised by the proposed rule is: Should propensity evidence be permitted in cases?). The Subcommittee is to meet and propose names of persons that are qualified to speak on pertinent Rule 404 issues. The goal is to have these people speak at the next Committee meeting. (The Committee mentioned the possibility of hearing from: Heidi Nestel from the Crime Victims Legal Clinic, a prosecutor, defense counsel, and someone with expertise in behavioral science to discuss (1) what do recidivism rates for sex offenders indicate? and (2) Do the recidivism rates suggest that Utah should promulgate a FRE 413 provision?).

(2) On the issue of whether a Doctrine of Chances (DOC) Rule should be drafted: The Committee would like the Subcommittee to draft some examples of proposed rules that incorporate the DOC (to the extent that the rule would address the types of cases when the doctrine would apply).

Suggestions/Summaries of Views of Subcommittee Members:

Judge Welch: I propose that we draft the following: (1) a draft rule that incorporates the concerns/limitations as expressed by Judge Harris in the *Lane* and *Murphy* cases, (2) A draft rule that incorporates the applicability of the Doctrine to a more broad sweep of types of cases (I believe that John Nielsen is advocating for this position.), and (3) Any other drafts that the Subcommittee has in mind. We can then take these draft rules to the Committee for a discussion and decision on which draft rule(s) to send to the Justices. Also, at https://www.swlaw.edu/sites/default/files/2019-03/1.Imwinkelried.PublishReady.pdf you can find Imwinkelried's 2019 article regarding the Doctrine of Chances ("The Evidentiary Issue Crystalized by the Cosby and Weinstein Scandals: The Propriety of Admitting Testimony about an Accused's Uncharged Misconduct Under the Doctrine of Objective Chances to Prove Identity."). This article briefly discusses the *Lopez* case that was decided by Utah Supreme Court. *See State v. Lopez*, 2018 UT 5. Moreover, this article indicates that Imwinkleried himself is still focused on fine-tuning the issue of how/when the Doctrine of Chances applies.

***Also, since our last Evidence Advisory Committee meeting, the Utah Supreme Court issued its decision in *State v. Argueta*, 2020 UT 41. *See* https://www.utcourts.gov/opinions/supopin/State%20v.%20Argueta20200702_20180814_41.pdf.

**Note: I was Mr. Argueta's appellate attorney in this case when it was briefed and argued before the Utah Supreme Court. I would like to highlight the following important take-aways from the Court's decision in *Argueta*:

(1) Paragraph ¶33 of *Argueta* states: "In *Verde*, we laid out some criteria for the application of the doctrine of chances. There we also acknowledged the difficult and sensitive nature of the doctrine's inquiry. Id.; id. ¶¶ 55, 57–61. Recent case law and law review publications have highlighted the difficulty of the doctrine's application in different circumstances. See, e.g., *State v. Lane*, 2019 UT App 86, ¶¶ 36–50, 444 P.3d 553 (Harris, J., concurring); *State v. Murphy*, 2019 UT App 64, ¶¶ 45–65, 441 P.3d 787 (Harris, J., concurring); Edward J. Imwinkelried, Criminal Minds: The Need to Refine the Application of the Doctrine of Objective Chances as a Justification for Introducing Uncharged Misconduct Evidence to Prove Intent, 45 HOFSTRA L. REV. 851 (2017). **The concerns raised in the court of appeals' case law and law review publications merit careful consideration. We therefore recently charged our advisory committee on the Utah Rules of Evidence to propose recommendations to address this issue. We will also continue clarifying the doctrine's application in our case law, as relevant issues come up, as we do here**." (emphasis added).

(2) Paragraph ¶34 of *Argueta* states: "**One such needed clarification concerns the articulation of the "rare misfortune" that triggers the doctrine's application.** "[C]are and precision are necessary to distinguish permissible and impermissible uses of evidence of prior bad acts, and to limit the factfinder's use of the evidence to the uses allowed by rule." *Verde*, 2012 UT 60, ¶ 55. The care and precision begin with the party seeking to admit a prior bad act under the doctrine of chances. **This party must articulate the "rare misfortune" that triggers the doctrine's application. Without a clear articulation of what event is being evaluated it is difficult to make sure that a prior bad act is admissible under the doctrine for a permissible inference**." (emphasis added).

***Importantly, the Utah Supreme Court emphasizes that if the "rare misfortune" that triggers the Doctrine's application is not initially and sufficiently articulated, it is then impossible for a court to determine whether the proffered evidence meets the Doctrine's four foundational requirements (i.e., materiality, similarity, frequency, and independence). *See Argueta*, 2020 UT 41, ¶¶35-43.

John Nielsen: I don't know that [a FRE 13 provision] is ever justified on recidivism alone; it's about the seriousness too—sex offenses are a lot bigger deal than thefts, broadly speaking. There's also a measurement problem. Crimes in general are underreported. The average drunk driver has driven drunk over 80 times before his first arrest: Arrest data: Federal Bureau of Investigation, "Crime in the United States: 2014" https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-29 Incidence data: Centers for Disease Control and Prevention. "Alcohol-Impaired Driving Among Adults — United States, 2012." Morbidity and Mortality Weekly Report. August 7, 2015 / 64(30);814-817. http://www.cdc.gov/mmwr/preview/mmwrhtml/mm6430a2.htm. Recidivism among sex offenders are difficult to measure. Especially with children, all happens in secret, is underreported, and not all reports result in prosecution/conviction https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/recidivismofadultsexualoffenders.pdf. One expert (Cory Jewell Jensen, from the Center for Behavioral Intervention), says sex offenders commit dozens of crimes before they are caught: https://www.oleantimesherald.com/news/child-sex-offenders-commit-several-crimes-before-they-are-caught/article_7e3f6db6-a57b-11e2-b775-0019bb2963f4.html. And recidivism can be a relative question. According to the DOJ, sex-crime re-arrest rate is 4x higher than for non-sex-offenders; and child-sex offenders are more likely to commit offenses against children. https://smart.ojp.gov/sites/g/files/xyckuh231/files/media/document/recidivismofadultsexualoffenders.pdf. A lot of it comes down to how the researcher defines recidivism and how long the follow-up period is. Those studies with longer follow-up periods show higher rates of recidivism.

Teneille Brown: There's a section in the George Fisher Evidence textbook that compares recidivism rates for various offenses as it relates to 413 (no surprise, theft has a higher rate than rape, according to the available statistics). Drug offenses have high recidivism rates too. Of course, all of this data is biased in what is reported, and what leads to arrest and prosecution, so it's imperfect…but it's something. I can find the chart and share. I am very familiar with the social science literature on how automatic character inferences are when people hear about past acts, but I'm not sure exactly what sort of data the committee wants—when the past act is immoral or stigmatized, it's more likely to create an attribution error, but don't know of any evidence comparing levels of prejudice, which would be important. Do people find past acts of rape to be more predictive of character and future actions than other past acts? I've looked for this precise comparison and haven't found anything. Negative traits are stickier, but I haven't seen comparisons within that large bucket… Theft has a much higher recidivism rate than sexual assault, and so the admission of sexual assault past acts cannot be justified based on recidivism risk alone…There is definitely a huge measurement problem with recidivism. Sex offenses are notoriously under-reported, and there are many other factors that predict whether someone will be re-arrested and prosecuted other than just the risk of re-offending. The bias in who gets arrested and prosecuted skews the data. For all we know, securities fraud might be the crime with the highest recidivism risk. I've never seen official records citing to the magnitude of the offense as a justification for permitting character evidence and propensity reasoning, although this is almost surely a basis. Many evidence commentators are willing to acknowledge that politics had more to do with permitting sexual assaults under 413 than any principled evidentiary reason.

The main takeaways I see from the social science research I've read so far:

1. People do assume that if someone did X before, they are the kind of person who will do X again (we assume traits are more stable than they are, and discount the role of opportunity/context)
2. Sometimes recidivism is high, so it might be probative, sometimes recidivism is low, so it is less probative
3. It is very hard for jurors to understand the distinction between using character evidence for propensity and non-propensity uses, even with clear instructions. In many cases, so-called "non-propensity" uses of past acts generate the very kind of attribution errors that rule 404 was created to prevent.
4. Forming impressions of others is such an innate part of being human, that we make character inferences from past acts automatically and without consciousness, and it's very hard to correct. In the absence of information about what someone has done in the past, we will use crude proxies such as their facial morphology and race to determine whether we trust them. So there are some who argue that past acts are better than inventing character based on physical characteristics.

I've canvassed the researchers for each topic we've identified:

> Kenneth J. Melilli, The Character Evidence Rule Revisited, 1998 B.Y.U. L. Rev. 1547, 1565 (1998)—this is an older piece, but his arguments still stand up, and he considers the doctrine of chances, along with its relation to FRE 413. He is currently at Creighton, but emeritus: melilli@creighton.edu.
>
> Ed Imwinkelried is probably **the** expert on the doctrine, as he has written on it the most. Even so, he holds a minority view. Most law professors who have written on the doctrine disagree with him on the validity of the doctrine of chances—(i.e., Leonard, Tillers, Park, Risinger, Loop) https://law.ucdavis.edu/faculty/imwinkelried/ Email: ejimwinkelried@ucdavis.edu Still, it's a valuable perspective.
>
> On the validity of using recidivism data to permit sexual assault propensity evidence:

Aviva Orenstein has written a few articles about this. A more recent one is: Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes, 81 U. Cin. L. Rev. 795 (2013) Aviva's email is: aorenste@indiana.edu

Katharine Baker wrote the most-cited article on the problems with the theory behind sexual assault propensity evidence (and FRE 413): Katharine K. Baker, Once A Rapist? Motivational Evidence and Relevancy in Rape Law, 110 Harv. L. Rev. 563 (1997) Her email is: kbaker@kentlaw.iit.edu.

Dallas Young: A good resource for someone who is familiar with the research on sex offender recidivism is **Dr. Kelly Socia**. *See* https://www.uml.edu/fahss/criminal-justice/faculty/socia-kelly.aspx. Also, as a general overview, the research suggests that among those with prior *convictions* for sex crimes, the likelihood of recidivism drops considerably after a few years in the community. The overall recidivism rate for "sex offenders" is much lower than the public normally believes. This New York Times video may be a good source to pass around, as it specifically relates to the misconception of sex offender recidivism in the courts (including SCOTUS): https://www.youtube.com/watch?v=TCkFg7o733k.Also, John's points on recidivism, those are fair points. And false reports can even further confound the numbers. There's no getting around the fact that it's a difficult thing to measure and track accurately. But I find the seriousness of the offense to be an even less satisfactory justification for the rule than recidivism. Without trying to minimize the seriousness of sex offenses, most would probably agree that it is not the "worst" category of person offenses (although they're certainly up there). Maybe I'm wrong about this, but it seems that the "ick" factor is a big driver here. Sex offenses are uniquely personal, violating, grotesque, etc.... And child sex offenses are all the worse due to the innocence and vulnerability of the victims, long-term impact on victims and their families, etc... I certainly agree with all that. But where I have difficulty is the idea that because of those factors we're going to let in propensity evidence, which everyone knows will make a conviction *much* more likely, all while acknowledging that the evidence has nothing in the world to do with the accusation(s) for which the defendant is on trial. It really feels like we're acknowledging that these are throw-away people so we don't care if they get convicted for who they are and not what they've done. I've heard a claim that since rule 404(c) was enacted, there has not been a single acquittal where 404(c) evidence came in. This came from a jailhouse lawyer so I certainly won't treat it as gospel truth. I've reached out to the AOC's data trackers to see if they track those data. I suspect they don't. Assuming they don't, can anyone else think of a way to vet that claim other than anecdotally? Whatever the actual truth is, it would be a helpful data point to consider if it can be identified with any degree of validity… I got the attached spreadsheet from the AOC data people with the following explanation: "Your results are attached. The file has two tabs with a list in each. The first is a case list containing case number, court location, filing date, case type, document entry date, document title, and what trial type. The second list contains case number, court location, filing date, case type, trial type, charge sequence where "1" distinguishes the highest severity while the largest number is the lowest severity on a case, charge description, judgment date, and judgment description. We had initially pulled a few hundred cases and had a list of about 130 cases that look to have started a trial or prepared for a trial but it looks like only about 28 actually ended in a trial verdict. However, as you have noted we probably aren't getting all the relevant cases do to our being limited to searching in document titles." I went through and pulled the docket on each of the cases listed and added Column I to indicate disposition. At a quick glance, most cases resulted in conviction on most or all charges. I did not find one with an across the board acquittal. This is obviously an imperfect analysis. For one, the data are incomplete. The AOC was only able to cross-reference cases that started a trial with document titles. I also did not dig into the weeds on cases where there were counts for which the defendant was acquitted. My indication of guilty in column I references whether there was a felony sex abuse conviction. For instance, there was one with F1 agg sex abuse of a child and a few MA sex battery charges. Sex battery got acquittals, but agg sex abuse resulted in conviction. I recorded that as a conviction. Anyway, while you have to be careful not to treat this data set as comprehensive, it does provide a good illustration of the power of 404(c) evidence.

*****At the August 14, 2020 Meeting, the Subcommittee discussed the following proposed rule (a rule drafted as a means to incorporate Judge Harris's concerns in the Lane and Murphy cases:**

Rule 404. Character Evidence; Crimes or Other Acts.

(a) Character Evidence.

(a)(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in conformity with the character or trait.

(a)(2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:

(a)(2)(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(a)(2)(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(a)(2)(B)(i) offer evidence to rebut it; and

(a)(2)(B)(ii) offer evidence of the defendant's same trait; and

(a)(2)(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(a)(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Crimes, Wrongs, or Other Acts.

(b)(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in conformity with the character.

(b)(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(b)(2)(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(b)(2)(B) do so before trial, or during trial if the court excuses lack of pretrial notice on good cause shown.

(b)(3) Permitted Uses; Doctrine of Chances. The court may admit prior act evidence for a proper, non-character statistical inference under the Doctrine of Chances. This Doctrine is a theory of logical relevance that rests on the objective improbability of the same rare misfortune befalling one individual over and over. Doctrine of Chances evidence involves rare events happening with unusual frequency. Prior act evidence may not be admitted under the Doctrine of Chances to rebut a self-defense claim or to rebut a defense of fabrication.

(c) Evidence of Similar Crimes in Child-Molestation Cases.

(c)(1) Permitted Uses. In a criminal case in which a defendant is accused of child molestation, the court may admit evidence that the defendant committed any other acts of child molestation to prove a propensity to commit the crime charged.

(c)(2) Disclosure. If the prosecution intends to offer this evidence it shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

(c)(3) For purposes of this rule "child molestation" means an act committed in relation to a child under the age of 14 which would, if committed in this state, be a sexual offense or an attempt to commit a sexual offense.

(c)(4) Rule 404(c) does not limit the admissibility of evidence otherwise admissible under Rule 404(a), 404(b), or any other rule of evidence.

Effective April 1, 2008

2020 Advisory Committee Note. The 2020 amendment incorporates the Doctrine of Chances into the rule and addresses the limits of admitting prior act evidence under the Doctrine of Chances. Prior cases left these issues unresolved. *See e.g., State v. Argueta*, 2020 UT 41, ¶¶33-45; *State v. Murphy*, 2019 UT App 64, ¶¶45-65, 441 P.3d 787; and *State v. Lane*, 2019 UT App 86, ¶¶36-50, 444 P.3d 553.

2011 Advisory Committee Note. The language of this rule has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Original Advisory Committee Note. Rule 404(a)-(b) is now Federal Rule of Evidence 404 verbatim. The 2001 amendments add the notice provisions already in the federal rule, add the amendments made to the federal rule effective December 1, 2000, and delete language added to the Utah Rule 404(b) in 1998. However, the deletion of that language is not intended to reinstate the holding of State v. Doporto, 935 P.2d 484 (Utah 1997). Evidence sought to be admitted under Rule 404(b) must also conform with Rules 402 and 403 to be admissible.

The 2008 amendment adds Rule 404(c). It applies in criminal cases where the accused is charged with a sexual offense against a child under the age of 14. Before evidence may be admitted under Rule 404(c), the trial court should conduct a hearing out of the presence of the jury to determine: (1) whether the accused committed other acts, which if committed in this State would constitute a sexual offense or an attempt to commit a sexual offense; (2) whether the evidence of other acts tends to prove the accused's propensity to commit the crime charged; and (3) whether under Rule 403 the danger of unfair prejudice substantially outweighs the probative value of the evidence, or whether for other reasons listed in Rule 403 the evidence should not be admitted. The court should consider the factors applicable as set forth in State v. Shickles, 760 P.2d 291, 295-96 (Utah 1988), which also may be applicable in determinations under Rule 404(b).

Upon the request of a party, the court may be required to provide a limiting instruction for evidence admitted under Rule 404(b) or (c).

****Update: After the August 14th Meeting, Professor Teneille Brown reached out via e-mail to Professor Imwinkleried.** Via e-mail, Prof. Imwinkleried was asked whether he had thoughts on whether the various issues and debates regarding the doctrine of chances would be best resolved via rule changes/amendments to URE 404. Prof. Imwinkleried responded in an e-mail dated 8/14/2020 as follows (Note: Prof. Imwinkleried gave permission to share this info);

"I have a few thoughts that I hope are relevant. In the short term, my initial inclination would be to rely on case law (and improved jury instructions) to develop the doctrine.
--To begin with, the wording of your rule is certainly broad enough to allow the courts to do so. There are three possible uses for evidence admitted under the doctrine, namely, to disprove accident, to prove intent, or to prove identity. "The Evidentiary Issues Crystallized by the Cosby and Weinstein Scandals: The Propriety of Admitting Testimony About an Accused's Uncharged Misconduct Under the Doctrine of Chances to Prove Identity," 48 SW.L.REV. 1 (2019). I have a version of the Utah rule in the appendix to volume 2 of UNCHARGED MISCONDUCT EVIDENCE. The rule refers to "intent, . . . identity, . . . or lack of accident."
--The foundational requirements for using uncharged misconduct to disprove accident or prove intent are becoming fairly well settled. "A Brief Essay Defending the Doctrine of Objective Chances as a Valid Theory for Introducing Evidence of an Accused's Uncharged Misconduct," 50 N.MEX.L.REV. 1 (2020). The HOFSTRA article makes the same point. However, at this point the refinement of the theory for using this type of evidence to prove identity is still very much a work in progress.
--Rather than amending the rule, it might be useful to develop pattern instructions for at least the uses of the theory to disprove accident and prove intent. By describing the elements of the doctrine in a pattern instruction, you can clearly signal trial judges what they need to find before allowing a prosecutor to invoke the theory for that particular purpose. The HOFSTRA article points out that in many cases in which the doctrine is the only possible theory for rationalizing the admission of uncharged to prove intent, the courts do not address the question of whether, considering both the charged and uncharged acts, the evidence establishes the occurrence of an extraordinary coincidence. The wording of the instruction could highlight that issue for the trial judge."

Tab 4

Rule 106 Subcommittee Meeting Notes for 8/7/2020: (The Subcommittee met remotely via Zoom).

In Attendance: (1) Judge Teresa Welch, (2) Judge David Williams, (3) Teneille Brown (4) John Nielsen, (5) Karen Klucznik.

Task: Pursuant to the June 2020 Evidence Advisory Committee (Committee) meeting, the Rule 106 Subcommittee (Subcommittee) was asked to meet and decide whether to support the draft rule 106 listed below. Moreover, if the Subcommittee does not support the draft rule, the Subcommittee is to propose an alternative draft(s) for the Committee to review. In addition, the Subcommittee is to discuss whether the note that accompanies Rule 106 should be revised.

Draft URE 106:

"If a party introduces all or part of a writing or recorded statement, or testimony of the contents thereof, an adverse party may require the introduction, at that time, of any part—or any other writing or recorded statement, even if the remainder is otherwise inadmissible under these rules, unless the court for good cause otherwise orders."

Discussions and Decisions: The Subcommittee met and discussed various issues and concerns regarding the most recent Draft Rule 106. The Subcommittee then drafted three proposed rules to send back to the Committee (see handout "URE 106 Proposed Draft Rules"). At the next meeting, the Committee can discuss and vote on which one of the three draft rules to send to the Utah Supreme Court Justices. Lastly, the Subcommittee drafted a proposed note to accompany URE 106.

Proposed Drafts re: Utah Rule of Evidence Rule 106

Rule 106. Remainder of or related writings or recorded statements.

VERSION #1: If a party introduces all or part of a writing or recorded statement, or testimony of the contents thereof, an adverse party may require the introduction, at that time or on cross-examination of that same witness, of any other part—or any other writing or recorded statement – ~~that in fairness ought to be considered at the same time~~ necessary to qualify, explain, or place into context any misleading portion already introduced. If the remainder is otherwise inadmissible under these rules, it may not be admitted for the truth of the matter asserted.

VERSION #2: If a party introduces all or part of a writing or recorded statement, or testimony of the contents thereof, an adverse party may require the introduction, at that time or on cross-examination of that same witness, of any other part—or any other writing or recorded statement – ~~that in fairness ought to be considered at the same time~~ necessary to qualify, explain, or place into context any misleading portion already introduced. If the remainder is otherwise inadmissible under these rules, it may not be admitted for the truth of the matter asserted, unless the court for good cause otherwise orders.

VERSION #3: If a party introduces all or part of a writing or recorded statement, or testimony of the contents thereof, an adverse party may require the introduction, at that time or on cross-examination of that same witness, of any other part—or any other writing or recorded statement – ~~that in fairness ought to be considered at the same time~~ necessary to qualify, explain, or place into context any misleading portion already introduced. If the remainder is otherwise inadmissible under these rules, it may be admitted for the truth of the matter asserted, unless the court decides otherwise under rule 403.

VERSION #3 (with John Lund edits): If a party introduces all or part of a writing or recorded statement, or testimony of the contents thereof, an adverse party may require the introduction, at that time or on cross-examination of that same witness, of any other part—or any other writing or recorded statement – ~~that in fairness ought to be considered at the same time~~ reasonably necessary to fairly qualify, explain, or place into context any ~~misleading~~ portion already introduced. Even if~~If~~ the ~~remainder~~additional part is otherwise inadmissible under these rules, it may be admitted for the truth of the matter asserted, unless the court decides otherwise under rule 403.

2020 Advisory Committee Note. The 2020 amendments clarify two things: first, that the rule applies to testimony of a written or recorded statement's contents, not just the writing or recording itself; and second, that the rule is an exception to other rules, such as hearsay. Prior cases left these issues unresolved. *See, e.g.*, *State v. Sanchez*, 2018 UT 31, ¶¶ 50-60, 422 P.3d 866; *State v. Jones*, 2015 UT 19, ¶ 41 n.56, 345 P.3d 1195. Its terms now differ from the federal version.

Admissibility under this rule does not absolve a party of the duty to ensure an adequate record for appellate review.

Original Advisory Committee Note. This rule is the federal rule, verbatim. Utah Rules of Evidence (1971) was not as specific, but Rule 106 is otherwise in accord with Utah practice

Tab 5

UTAH STATE COURTS

Keisa Williams <keisaw@utcourts.gov>

Rule 512

4 messages

Judge Matthew Bates <mbates@utcourts.gov> Tue, Apr 21, 2020 at 3:33 PM
To: vlsnow@le.utah.gov
Cc: Keisa Williams <keisaw@utcourts.gov>, Michael Drechsel <michaelcd@utcourts.gov>

Representative Snow,

I hope this email finds you healthy and well. I'm reaching out to you for some help with our draft amendment to Rule 512. As you hopefully remember, you and I met several weeks ago to review the amendment to the Rule, and you provided some input that was very helpful to us in adhering to the legislative intent of the privilege. After that meeting, the Supreme Court reviewed the draft, made a small grammatical change, and sent it out for public comment. The proposed amendment received one public comment.

The committee discussed that comment last week and then asked me to contact you with a question about the scope of the privilege and the effect of disclosures under subsections (d)(2) and (d)(3) of our amendment. Those sections permit disclosure of the communication when the communication is evidence of the "victim being in clear and immediate danger to the victim's self or others" or when the communication is evidence that "the victim has committee a crime, plans to commit a crime, or intends to conceal a crime." But subsection (2) states that such disclosures do not waive the privilege, meaning the communications still would not be admissible in any court proceeding.

This is inconsistent with how other rules of privilege treat such disclosures. For example, the peer-support privilege, Rule 507, which was created by the legislature a few years ago, does not apply in the circumstances described in subsections (d)(2) and (d)(3) of our proposed amendment. The attorney-client privilege, Rule 504, does not apply if the services of the lawyer were sought or obtained to enable or anyone to commit or plan to commit a crime or fraud. And, the husband-wife privilege, Rule 502, does not apply to any communication made to enable or aid anyone to commit, plan, or conceal a crime or tort. Given the scope of these other privileges, the committee felt that to be consistent that subsections (d)(2) and (d)(3) should be moved to subsection (e), which would make any communications disclosed under those subsections admissible in court, just like the other privilege rules.

But because this is a privilege that was created by the legislature, it is important to us that we honor the legislative intent, and we would appreciate your input. Should the communications described in subsections (d)(2) or (d)(3) be admissible in court? I attached a copy of the draft amendment just in case you don't have one handy.

I imagine you probably did not expect to still be involved in this more than a year after your bill passed. But this is an unusual circumstance where the Supreme Court has asked us to revise a rule created by the legislature. And your input has been extremely helpful. So please know that we value your time and attention to help us get this right. I'd be happy to chat by phone or video conference if that's easier.

Matthew Bates
Judge, Utah Third District Court
801-842-69369

URE-512-Redlined-for-comment-2-20-20.pdf
56K

Keisa Williams <keisaw@utcourts.gov> Tue, May 5, 2020 at 2:36 PM
To: jcarlton@le.utah.gov, Michael Drechsel <michaelcd@utcourts.gov>

Jacqueline,

Below is an email from Judge Bates to Rep. Snow with the latest information on URE 512. Let me know if this doesn't answer the questions you sent me in that separate email or if you need more information.

Thanks,
Keisa
[Quoted text hidden]
--
Keisa Williams
Associate General Counsel
Administrative Office of the Courts
450 South State Street
P.O. Box 140241
Salt Lake City, UT 84114-0241
Work Cell: 385-227-1426
Email: keisaw@utcourts.gov

URE-512-Redlined-for-comment-2-20-20.pdf
56K

Lowry Snow <vlsnow@le.utah.gov> Tue, May 5, 2020 at 3:16 PM
To: Judge Matthew Bates <mbates@utcourts.gov>
Cc: Keisa Williams <keisaw@utcourts.gov>, Michael Drechsel <michaelcd@utcourts.gov>

Judge Bates,
Thank you for your email. I apologize for not responding sooner. Somehow in the press of dealing with multiple matters, your email escaped my attention. I'm working on the issues raised in your email now with legislative counsel and will respond shortly. Thank you for your patience.
Rep Snow

Representative V. Lowry Snow
vlsnow@le.utah.gov
435-703-3688
912 West 1600 South, Suite 200
St. George, UT 84770

From: Judge Matthew Bates <mbates@utcourts.gov>
Sent: Tuesday, April 21, 2020 3:33 PM
To: Lowry Snow <vlsnow@le.utah.gov>
Cc: Keisa Williams <keisaw@utcourts.gov>; Michael Drechsel <michaelcd@utcourts.gov>
Subject: Rule 512

[Quoted text hidden]

Mbates <mbates@utcourts.gov> Thu, May 7, 2020 at 3:06 PM
To: Lowry Snow <vlsnow@le.utah.gov>
Cc: Keisa Williams <keisaw@utcourts.gov>, Michael Drechsel <michaelcd@utcourts.gov>

Representative, no need to apologize. I am certain that you and your colleagues are very busy dealing with the issues created by the current global pandemic on top of your other responsibilities that keep Utah functioning. We are grateful to have such capable and attentive leaders in our legislature. And I appreciate your attention to this rule amendment whenever you have time.

Matt
[Quoted text hidden]

Evidence Advisory Committee Minutes – April 14, 2020

URE 512 Victim Communications:

Keisa Williams: A draft of URE 512 was presented to the Supreme Court. They made a grammatical change and sent it out for public comment. The rule received one comment and is now back with the Committee for feedback and any necessary revisions.

John Lund: The public comment addressed unintentional disclosures and asked whether the rule only addresses intentional disclosures. The question for the Evidence Advisory Committee is: Are waivers treated the same in this privilege as they are in other privileges?

Judge Bates: After reading the comment, I compared the way we drafted exceptions to the rule in 512 (as far as what waived and didn't waive privilege) to the other rules of evidence. It might be more consistent with the way we've structured exceptions in other rules, to move subsections (d)(2) and (d)(3) down to subsection (e) so that those circumstances do waive the privilege. In other rules, when the holder of the privilege does something that requires somebody else to disclose the confidential communication because of a public safety threat, that disclosure functions as a waiver of the privilege.

John Lund: The right of an attorney to disclose information if he/she is concerned a crime may be committed by a client is set up as a waiver rather than an exception to a privilege.

Judge Bates: I agree. In that situation, the disclosed communication becomes admissible in court and a privilege no longer exists in regard to that communication. If a victim does something that poses a public safety threat and an advocate is required to disclose the communication, then it ought to waive the privilege as it would in other rules.

Dallas Young: Under the attorney/client privilege it's called an exception. The net result is the same, but it's called an exception as opposed to a waiver.

John Lund: In subsection (a) of URE 510 (Miscellaneous Matters), the privilege is waived if the holder of the privilege fails to take reasonable precautions against inadvertent disclosure or voluntarily discloses or consents to the disclosure. That's the broader treatment of waivers that I think would apply to the 512 privilege like all the rest.

Ed Havas: Is there a legitimate distinction between an exception and a waiver? Judge Bates noted in the attorney/client rule that there are exceptions to the privilege allowing the communication to be disclosed without waiving the privilege. That seems to be preferable language. The rest of the privilege ought not simply evaporate because of some conduct that might follow the exception.

Dallas Young: It makes more sense to carve out the communication in terms of an exception as opposed to a waiver. Criminal law in regard to waivers requires knowledge of a criminal right and

an intentional relinquishment of that right. That doesn't seem to match up with what's described in (d)(2) and (d)(3).

Judge Bates: The reason the subcommittee structured the rule the way it did was because the original legislation was unclear about whether a disclosure would function as an exception or a waiver of the privilege. What I'm hearing is that maybe some of the disclosures in (d) are more appropriately couched not as disclosures that do not waive the privilege, but as disclosures that are exceptions to the privilege. If there is no known relinquishment of a right, maybe we ought to call (d)(2) and (d)(3) exceptions.

John Lund: (d)(1) should also be included. Dallas Young: Suggested changing the language in line 42 to read, "these are the exceptions to the privilege."

Ed Havas: That strikes me as consistent with the intent of the draft. If we're saying these disclosures don't waive the privilege, in essence we're saying the disclosures are excepted from the privilege but it doesn't mean the privilege is waived if you take advantage of that exception.

Chris Hogle: In the attorney/client privilege rule (URE 504), under subsection (d) the first exception to the privilege is the crime/fraud exception. I don't know that we want to borrow that phraseology for 512 because in the lawyer/client context, exceptions are things that don't apply regardless of the intent of the holder of the privilege. I like the way things are now. I don't see a need to change the phraseology of 512 because "disclosures that do not waive the privilege" means that those disclosures do not affect the applicability of the privilege.

John Lund: On balance, I'm leaning the way Chris is for substantive reasons and because "disclosures that do not waive the privilege" is phrased the way the drafters preferred. Unless we can provide the Court with an important reason not to keep that phraseology, then we ought to leave it the way it is. We need a reason to warrant another round of revisions.

Judge Bates: In my mind the Committee is discussing two issues:

1. Has the Committee correctly identified waivers and exceptions in (d) and (e)? And what is the effect of the disclosures?
2. Do (d)(1), (d)(2), and (d)(3) belong under (d) or (e)?

I agree with Chris that the language structure should stay the way it is. And I think subsections (d)(1), (d)(2), and (d)(3) should be moved to (e). Example: A victim communicates to a victim advocate that they are going to commit or have committed a crime. The advocate now has to disclose that under (d)(2) or (d)(3). If the disclosure does not result in a waiver or revocation of the privilege, it loses some of its effect. A law enforcement officer might act on it and go talk to the victim, but the disclosure still can't be used in any evidentiary proceeding in court. Part of the reason we would want to call that a waiver and stick it down under (e) is so that if the prosecutor charges the victim with a crime or a civil action is filed related to what the victim was intending to do, the statement to the victim advocate can be used as evidence. The way the rule is structured right now, the statement couldn't be used as evidence because the disclosure didn't waive the privilege.

John Lund: There may be a fundamental problem with that construct. Doctors are required to disclose a certain amount of information, evidence of sexual abuse for example, but those scenarios aren't included in the privilege rule itself. None of the other rules include specific disclosures that waive the privilege and specific disclosures that don't.

Judge Bates: Isn't subsection (d)(2) in the physician/patient rule (communications relevant to proceedings to hospitalize patients for mental illness), similar to 512? Those communications are exceptions to the privilege and no privilege exists.

Tenielle Brown: The child abuse mandatory reporter statutes specify the minimum amount of disclosure so as not to waive the privilege. Sometimes if it's not in the statute itself it will be in common law interpreting the statute. In certain circumstances, there's no waiver even if some amount was disclosed pursuant to the child abuse mandatory reporting requirements.

Deborah Bulkeley: I tend to agree with Judges Bates, but didn't the Supreme Court reject a previous draft of 512 that made some of those disclosures waivers?

Judge Bates: Rep. Snow was more worried about the stuff in (e) and (d)(4) and (5). URE 507 is similar to URE 512 in that we drafted it out of whole cloth at the request of the legislature. In 507, the exceptions under subsection (d) waive the privilege. Those exceptions are very similar to (d)(1)-(3) in 512, but the way we have 512 structured the privilege still exists under those same circumstances.

Chris Hogle: Should there be a distinction about where the privilege applies? When a victim tells an advocate they are going to commit crime, maybe that disclosure ought to be admissible in a case against the victim, but not admissible in a case against the perpetrator.

Judge Jones: From a rule construction standpoint my concern is articulating one privilege differently than the other privileges (exception vs. waiver). If we do, the question becomes whether the catchall waiver in URE 510 applies to 512? If 510 is intended to apply to all privileges across the board, then we need to use "exception" in 512 so that we aren't sending a message that waivers apply differently in that context.

John Lund: I agree. (d) = exceptions. (e) = things that waive the privilege. We could include an intro to subsection (e) that says, "in addition to a waiver that occurs under the auspices of URE 510, the following are things that waive the privilege." That would provide some coordination between the rules.

Judge Bates: Suggest getting Rep. Snow's input about (d)(1), (d)(2), and (d)(3) before the subcommittee redrafts Rule 512 to find out how strongly he feels about protecting them. In addition, I agree that we should include John's suggested intro to (e).

Chris Hogle: I think the exception language in URE 507 is a good model. When we go back to Rep. Snow we should also address whether he thought about the application of the privilege in a

case against the victim rather than the perpetrator.

Mike Drechsel: Rep. Snow's version of 512 in the joint resolution structured (d)(1), (d)(2), and (d)(3) as exceptions so I think we know where he stands on that. But I do think the question of whether it applies in a case involving a different perpetrator or criminal action is interesting.

Motion: ***John Neilsen made a motion to table redrafting the rule for 30 days to get Rep. Snow's feedback. Judge Jones seconded the motion. The motion passed unanimously.***

Rule 512. Victim communications.

(a) Definitions.

(a)(1) "Advocacy services" means the same as that term is defined in UCA § 77-38-403.

(a)(2) "Confidential communication" means a communication that is intended to be confidential between a victim and a victim advocate for the purpose of obtaining advocacy services as defined in UCA § 77-38-403.

(a)(3) "Criminal justice system victim advocate" means the same as that term is defined in UCA § 77-38-403.

(a)(4) "Health care provider" means the same as that term is defined in UCA § 78B-3-403.

(a)(5) "Mental health therapist" means the same as that term is defined in UCA § 58-60-102.

(a)(6) "Victim" means an individual defined as a victim in UCA § 77-38-403.

(a)(7) "Victim advocate" means the same as that term is defined in UCA § 77-38-403.

(b) Statement of the Privilege. A victim communicating with a victim advocate has a privilege during the victim's life to refuse to disclose and to prevent any other person from disclosing a confidential communication.

(c) Who May Claim the Privilege. The privilege may be claimed by:

(c)(1) the victim;

(c)(2) ~~engaged in a confidential communication, or~~ the guardian or conservator of the victim ~~engaged in a confidential communication~~ if the guardian or conservator is not the accused; and~~.~~

(c)(3) ~~An individual who is a~~the victim advocate ~~at the time of a confidential communication is presumed to have authority~~ during the life of the victim ~~to claim the privilege on behalf of the victim~~.

(d) Disclosures That Do Not Waive the Privilege. The confidential communication may be disclosed in the following circumstances without waiving the privilege found in paragraph (b):

(d)(1) the confidential communication is required to be disclosed under Title 62A, Chapter 4a, Child and Family Services, or UCA § 62A-3-305;

(d)(2) the confidential communication is evidence of a victim being in clear and immediate danger to the victim's self or others;

(d)(3) the confidential communication is evidence that the victim has committed a crime, plans to commit a crime, or intends to conceal a crime;

(d)(4) the confidential communication is disclosed by a criminal justice system victim advocate for the purpose of providing advocacy services, and the disclosure is to a law enforcement officer, health care provider, mental health therapist, domestic violence shelter employee, an employee of the Utah Office for Victims of Crime, a member of a multidisciplinary team assembled by a Children's Justice Center or law enforcement agency, or a parent or guardian if the victim is a minor and the parent or guardian is not the accused;

(d)(5) the confidential communication is with a criminal justice system victim advocate, and the criminal justice system victim advocate must disclose the confidential communication to a prosecutor under UCA § 77-38-405.

(e) Disclosures That Waive the Privilege.

(e)(1) No privilege exists under paragraph (b) if:

(e)(1)(A) the victim, or the victim's guardian or conservator, if the guardian or conservator is not the accused, provides written, informed, and voluntary consent for the disclosure, and the written disclosure contains:

(e)(1)(A)(i) the specific confidential communication subject to disclosure;

(e)(1)(A)(ii) the limited purpose of the disclosure;

(e)(1)(A)(iii) the name of the individual or party to which the specific confidential communication may be disclosed; and

(e)(1)(A)(iv) a warning that the disclosure will waive the privilege;

(e)(1)(B) the confidential communication is with a criminal justice system victim advocate, and a court determines, after the victim and the defense attorney have been notified and afforded an opportunity to be heard at an in camera review, that:

(e)(1)(B)(i) the probative value of the confidential communication and the interest of justice served by the admission of the confidential

communication substantially outweigh the adverse effect of the admission of the confidential communication on the victim or the relationship between the victim and the criminal justice system victim advocate; or

(e)(1)(B)(ii) the confidential communication is exculpatory evidence, including impeachment evidence.

(e)(2) A request for a hearing and in camera review under paragraph (e)(1)(B) may be made by any party by motion. The court shall give all parties and the victim notice of any hearing and an opportunity to be heard.